

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

RICHARD O. BUSE,

Case No. C-08-0510-MJP

**PLAINTIFF,**

V.

FIRST AMERICAN TITLE INSURANCE COMPANY, FORECLOSURELINK, INC., GREENPOINT MORTGAGE FUNDING, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., RESCOMM HOLDINGS NO. 2, LLC, UM ACQUISITIONS, LLC, TOM BLOCK, AND DOE DEFENDANTS 1 THROUGH 20.

PLAINTIFF RICHARD BUSES RESPONSE  
TO THE MOTION FOR SUMMARY  
JUDGMENT BROUGHT BY  
DEFENDANTS FORECLOSURELINK,  
INC. AND FIRST AMERICAN TITLE  
INSURANCE COMPANY

## DEFENDANTS.

Plaintiff Richard Buse hereby responds to the Motion for Summary Judgment filed by Defendants FORECLOSURELINK, INC. (“ForeclosureLink”) and First American Title Insurance Company (“First American”).

## L FACTS

Mr. Buse's claims arise from a multitude of activities engaged in by the various defendants who were involved in the initiation of a foreclosure proceeding against him last

MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.'S FIRST SET OF  
INTERROGATORIES AND REQUESTS FOR  
PRODUCTION - 1

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1 year. Mr. Buse has resolved his claims against the foreclosing entity, Defendant Tom Block,  
 2 and those claims have been dismissed, pursuant to the terms of a Settlement Agreement which  
 3 has been presented to the Court as an attachment to the Declaration of Peter Salmon filed by  
 4 Defendants ForeclosureLink and First American in support of their Motion. Mr. Buse has also  
 5 settled his claims against Defendants Greenpoint and MERS and is in the process of completing  
 6 the documentation of those settlement terms. *See*, Declaration of Melissa A. Huelsman filed in  
 7 support of this Response (“Huelsman Dec.”), ¶2. The parties to those agreements expect to  
 8 have that process completed by the end of this week. *Id.*

10 The claims remaining against Defendants ForeclosureLink and First American are  
 11 related to the manner in which they engaged in the conduct of the foreclosure sale process.  
 12 Whether or not Mr. Buse was delinquent on the loan is not relevant to the analysis of the claims  
 13 being made against these defendants. Rather, the assertion is that these Defendants were  
 14 violating the requirements of the Washington Deed of Trust (“DTA”), RCW 61.24, *et seq.*  
 15 when they initiated the foreclosure sale and caused false documentation to be recorded in the  
 16 records of King County, Washington.

18 Without restating the entirety of Mr. Buse’s Factual Portion of his Complaint, it is  
 19 important to note as regards the claims against these defendants that Defendant Block executed  
 20 an Appointment of Successor Trustee document on January 4, 2007 appointing Defendant First  
 21 American as the successor trustee, after he acquired ownership of Mr. Buse’s second mortgage  
 22 loan. However, the document’s return address was at the offices of Defendant  
 23 ForeclosureLink. A copy of that Appointment of Successor Trustee document is attached to  
 24 the Affidavit of ForeclosureLink filed in support of the MSJ (“ForeclosureLink Aff.”) as  
 25 Exhibit “A”. That document was not recorded until January 9, 2007, which was the date that it

1 became effective under Washington law. RCW 61.24.010(2). Nevertheless, Defendant First  
 2 American, by and through its purported agent, Defendant ForeclosureLink, served Mr. Buse  
 3 with a Notice of Default document, at a time when neither of those defendants had been  
 4 properly appointed as the trustee. A copy of the Notice of Default is attached to the  
 5 ForeclosureLink Aff. As Exhibit "B".  
 6

7       The Notice of Trustee's Sale initiated by Defendant ForeclosureLink as the ostensible  
 8 agent of Defendant First American was recorded on December 4, 2007 in the records of King  
 9 County, Washington. The only address listed for contact with the foreclosing trustee on that  
 10 document is an address in Fair Oaks, California. There is no Washington address on the  
 11 document for contacting the alleged trustee, Defendant First American and the return address  
 12 for the recording is Defendant ForeclosureLink's office in Fair Oaks, California. A copy of the  
 13 recorded Notice of Trustee's Sale is attached to the ForeclosureLink Aff. as Exhibit "D". A  
 14 copy of an additional document entitled Notice of Foreclosure is attached to the  
 15 ForeclosureLink Aff. as Exhibit "C" showing that a motion to enjoin the sale should be served  
 16 upon Defendant First American at an address in Washington. (Another Notice of Trustee's  
 17 Sale was recorded earlier in the year as well, and that sale was discontinued after Mr. Buse  
 18 resolved his dispute with Mr. Block.)  
 19

20       In its Motion for Summary Judgment, Defendants ForeclosureLink and First American  
 21 submit Affidavits which describe the terms and nature of the written agreement entered into  
 22 between these two defendants. Marsha Townsend, Vice President of ForeclosureLink and Jerry  
 23 Jeffers, Assistant Vice President and Chief Title Officer, both testify about this purported  
 24 agreement, but neither one of them bothers to provide this Court with the writing itself, in  
 25 contravention of the Best Evidence Rule, ER 1002. In fact, at Paragraph 6, Ms. Townsend  
 26

1 states that “the business records are available for inspection and copies can be submitted to the  
 2 Court if required.” ForeclosureLink Aff., ¶6. Ms. Townsend does not explain why she cannot  
 3 provide those documents to the Court in support of her affidavit. Also without foundation, Ms.  
 4 Townsend asserts that its trustee sale documents “comply with Washington law”. *Id.*, ¶7.  
 5

6 Ms. Townsend goes on to assert that

7 Foreclosurelink only serves as an agent for First American when specifically  
 agreed upon for specific nonjudicial foreclosure of real property.  
 8 Foreclosurelink does not have authority from First American to serve as the  
 agent for First American for purposes of a nonjudicial foreclosure without the  
 9 prior written consent of First American, and is authorized to sign documents  
 10 only as the agent of First American. Unless specifically agreed upon in writing  
 11 for a limited purpose, Foreclosurelink does not have a power of attorney to  
 execute documents on behalf of First American in connection with any  
 nonjudicial foreclosure sale.

12 *Id.*, ¶8. Yet again, Ms. Townsend does not provide the Court with the documentation  
 13 evidencing the “specifically agreed upon” terms of Mr. Buse’s foreclosure sale to support her  
 14 assertions, these “specific” documents which give Defendant ForeclosureLink these particular  
 15 powers nor the “limited” power of attorney. *Id.* Instead, both Defendants ForeclosureLink and  
 16 First American just ask this Court to rely upon the assertions of these corporate officers rather  
 17 than actually providing the documentation.

18 In contradiction to the assertions made in Paragraph 8, Ms. Townsend, in Paragraph 9,  
 19 begins by stating that it was Defendant ForeclosureLink which first contacted Defendant First  
 20 American about the trustee’s sale which Mr. Block needed to have conducted. *Id.*, ¶9. This  
 21 information is also provided by Mr. Jeffers, whose affidavit is virtually identical to that  
 22 presented by Ms. Townsend except for the reversal of roles – she is testifying for Defendant  
 23 ForeclosureLink and he for First American. Jeffers Aff. Still, both Ms. Townsend and Mr.  
 24 Jeffers both assert that it was Defendant ForeclosureLink – the purported agent – who  
 25  
 26

1 contacted Defendant First American about conducting a foreclosure sale in the State of  
 2 Washington. In Ms. Townsend's Affidavit on behalf of Defendant ForecloosureLink she does  
 3 not assert that it is authorized under Washington law to conduct foreclosure sales except by  
 4 way of its purported agency relationship with Defendant First American. ForeclosureLink Aff.,  
 5 ¶7-9. Mr. Jeffers, on the other hand, does assert that Defendant First American is authorized to  
 6 conduct foreclosure sales in the State of Washington based upon its licensing as a title  
 7 insurance company. Jeffers Aff., ¶6-8.

9 Both of the Affidavits of Ms. Townsend and Mr. Jeffers also assert that all work on the  
 10 foreclosure was done by Defendant ForeclosureLink, except for a title insurance guaranty  
 11 issued by Defendant First American, which Defendant ForeclosureLink used to obtain  
 12 addresses for notification. ForeclosureLink Aff., ¶9-14; Jeffers Aff., ¶9-17. Further, while Mr.  
 13 Jeffers makes blanket assertions about his maintenance and familiarity with the records of  
 14 Defendant First American as it pertains to Mr. Buse's foreclosure, the majority of his testimony  
 15 is about the work that Defendant ForeclosureLink undertook and performed, and he does not  
 16 provide any description regarding how he or Defendant First American has any personal  
 17 knowledge about what Defendant ForeclosureLink did or did not do in connection with this  
 18 particular foreclosure sale(s). *Id.* Mr. Jeffers does not report that he has access to Defendant  
 19 ForeclosureLink's records. He does not report that these defendants share a record keeping  
 20 system such that he has access the records of another company, nor does he even explain how it  
 21 is that he has access to records regarding the conduct of foreclosure sales in the State of  
 22 Washington when he is physically located in the State of Nevada, as evidenced by the  
 23 notarization of his signature. *Id.* In fact, Mr. Jeffers asserted that it was entirely proper for the  
 24 executed Appointment of Successor Trustee document, appointing Defendant First American

1 as trustee, to be returned to Defendant ForeclosureLink. Jeffers Aff., ¶12. He does not explain  
 2 how it is that Defendant First American allegedly came into possession of a document, such  
 3 that it could maintain it in its files for purposes of now providing it to the Court, if it was  
 4 properly returned to Defendant ForeclosureLink.

5 As noted in the Amended Complaint, Defendant ForeclosureLink's employees were the  
 6 only persons who signed the foreclosure documents, and its contact information is the only  
 7 information on any of the foreclosure documents. Ms. Townsend tries to provide this Court  
 8 with an expert opinion about the "use of agents to assist in the preparation and delivery of  
 9 nonjudicial foreclosure notices is common for nonjudicial foreclosures processed within the  
 10 State of Washington." ForeclosureLink Aff., ¶16. Since Ms. Townsend has not been proffered  
 11 as an expert witness, her testimony on this subject should also be stricken. It may also be  
 12 interpreted as Ms. Townsend's attempt to instruct this Court as to the proper interpretation of  
 13 the law of the State of Washington, which is a decision left entirely to this Court and not to Ms.  
 14 Townsend. Mr. Jeffers also attempts to similarly instruct this Court and/or provide  
 15 undesignated expert testimony about "common practices" in Washington state. Jeffers Aff.,  
 16 ¶19. More importantly though, the Defendants are choosing to ignore that even if their actions  
 17 have become "common practice" in the State of Washington, it does not mean that they are in  
 18 conformity with the law of the State.

## 21 II. ARGUMENT

### 23 A. Motion for Summary Judgment Standard.

24 In bringing a motion for summary judgment, the moving party bears the burden of  
 25 proving the absence of any genuine issue of material fact. *Celotex Corp. v. Catrell*, 477 U.S.  
 26 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The disputed facts must be material,

1 or they must “affect the outcome of the suit under the governing law.” *Anderson v. Liberty*  
 2 *Lobby*, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514-15, 91 L.Ed.2d 202 (1986).

3       Summary judgment is not the preferred method of determining a case. It should only be  
 4 granted if after considering all of the pleadings, declarations, deposition testimony or  
 5 admissions and all reasonable inferences drawn therefrom are in favor of the non-moving party,  
 6 the Court can say (1) that there is no genuine issue as to any material fact, (2) that all  
 7 reasonable persons could reach only one conclusion, and (3) that the moving party is entitled to  
 8 judgment as a matter of law. *Baker v. Schatz*, 80 Wn.App. 775, 782, 912 P.2d 501 (1996),  
 9 citing *Peterick v. State*, 22 Wn. App. 163, 180-181, 589 P.2d 250 (1977); *see also*, FRCP 56(c).  
 10 As noted in *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 63 P.2d 125  
 11 (2003),

12       Summary judgment is appropriate if the pleadings, affidavits, depositions and  
 13 admissions on file demonstrate the absence of any genuine issues of material  
 14 fact, and that the moving party is entitled to judgment as a matter of law. CR  
 15 56(c). The court must consider all facts submitted and all reasonable inferences  
 16 drawn from them in the light most favorable to the nonmoving party. *Wilson v.*  
 17 *Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The court should grant  
 18 the motion only if, from all of the evidence, reasonable persons could reach but  
 one conclusion. *Id.*

19       A court should not resolve a genuine issue of credibility at a summary judgment  
 20 hearing. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138, 95 A.L.R.3d 225 (1977). An issue  
 21 of credibility is present when the party opposing the summary judgment motion comes forward  
 22 with evidence which contradicts or impeaches the movant's evidence on a material issue.  
 23 *Dunlap v. Wayne*, 105 Wash.2d 529, 536-37, 716 P.2d 842 (1986).

24       B.     Mr. Buse can prevail upon claims under the law because the Defendants'  
 25 actions, as evidenced by their own affidavits, demonstrates that they did not act in conformity  
 26 with the Deed of Trust Act.

1       Defendant ForeclosureLink has attempted to evade the requirements for acting as a  
 2 trustee in the State of Washington by using Defendant First American as a “front”, since it is a  
 3 title insurance company licensed in the State of Washington and therefore it would be able to  
 4 act as a trustee. RCW 61.24.010. The relevant portion of the Deed of Trust Act (“DTA”)  
 5 specifies quite clearly who may act as a foreclosing trustee. It states, in pertinent part:  
 6

- 7             (1) The trustee of a deed of trust under this chapter shall be:
  - 8                 (a) Any domestic corporation authorized to insure title to real  
                   property under the laws of this state, or its agents; or
  - 9                 (b) Any title insurance company authorized to ensure title to real  
                   property under the laws of this state, or its agents; or . . .

10      RCW 61.24.010.

11       Defendant First American, as a licensed title insurance company, does not qualify as a  
 12 trustee under these provisions, but Defendant ForeclosureLink (which is not even licensed to  
 13 engage in business in this state) is not so authorized. Huelsman Dec., ¶3. RCW  
 14 61.24.010(a)(b) allows the “agent” of a title insurance company to act on its behalf, but  
 15 “agents” for title insurance companies are defined under that licensing statute. RCW 48.17, *et*  
 16 *seq.* Under RCW 48.17.010(15) a “title insurance agent” is defined as “a business entity  
 17 licensed under the laws of this state and appointed by an authorized title insurance company to  
 18 sell, solicit or negotiate insurance on behalf of the title insurance company.” Further, RCW  
 19 48.29.160 verifies that, “To be licensed as [an] agent of a title insurer, the applicant must own  
 20 or lease and maintain a complete set of tract indexes of the county or counties in which such  
 21 agent will do business.” There is no indication whatsoever that Defendant ForeclosureLink has  
 22 such an index in King County, or even that it has any business address located in the State of  
 23 Washington. It is clear that Defendant ForeclosureLink – the actual foreclosing trustee – is not  
 24 authorized to act as a trustee in the State of Washington and its “agent” status with Defendant

1 First American does not meet the criteria defined in the statute and is nothing more than a  
 2 sham.

3 Supporting Mr. Buse's position as to the correct interpretation of the meaning of the  
 4 word "agent" in the DTA is an amendment made to the DTA by the Washington Legislature  
 5 this year. The Bill to amend the DTA, HB 5810, was passed by both the House of  
 6 Representatives and the Senate, and is currently being forwarded to Governor Gregoire for  
 7 signature. *See*, Huelsman Dec., ¶4. A copy of the history of the Bill, the Bill itself which was  
 8 approved by both houses of the Washington Legislature, and the last Senate Bill Report to the  
 9 Senate about the Bill and its history are attached to the Huelsman Declaration as Exhibit "1".  
 10 Page 10 of the Bill shows the change that was made to the DTA to clarify the intent of the  
 11 Legislature in using the word "agent" in RCW 61.24.010(b), which refers only to a "title  
 12 insurance agent as defined under chapter 48.17 RCW, not in a more generic use of the word in  
 13 a legal context. The DTA, once signed by Governor Gregoire, will now clearly state that in  
 14 order for a title insurance company to use an "agent" to conduct foreclosure sales in the State of  
 15 Washington, that "agent" must also be licensed in this State. *Id.* The Senate Bill Report  
 16 discusses in detail some of the more complex changes to the DTA and states, regarding the  
 17 other more minor changes to the DTA such as the "agent" definition, that they were "changes  
 18 for clarification". *Id.* Again, this supports Mr. Buse's position in this case.  
 19

20 This too is consistent with the rest of the portion of the DTA devoted to identifying  
 21 those persons or entities who may engage in the business of acting as a foreclosing trustee.  
 22 RCW 61.24.010(1) specifies that a foreclosing trustee must be:

- 23
- (a) "a **domestic** corporation incorporated under Title 23B, 30, 31, 32 or 33 RCW  
   of which at least one officer is a Washington resident"; or
  - (b) a title insurance company or title insurance agent; or
  - (c) an attorney who is licensed to practice in the State of Washington; or

24 PLAINTIFF'S RESPONSE TO DEF.

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1                             (d) a professional corporation or limited liability company owned and operated  
 2                             by attorneys licensed to practice in the State of Washington; or  
 3                             (e) any agency or instrumentality of the U.S. government; or  
 4                             (f) "any national bank, savings bank, or savings and loan association chartered  
 5                             under the laws of the United States".

6                     RCW 61.24.010(1) (emphasis added). Clearly, the Washington Legislature was quite  
 7                     concerned with foreclosing trustees being Washington state residents and having a physical  
 8                     presence in the state. RCW 61.24.010(1)(a). The only entities which may be a foreclosing  
 9                     trustee without being licensed by the State of Washington in some fashion are federal  
 10                    government agencies and national banks (and clearly these entities cannot be regulated by the  
 11                    state). If the Washington Legislature had intended to allow out-of-state entities like Defendant  
 12                    ForeclosureLink to conduct foreclosures in this state, it would have included language allowing  
 13                    them to so operate. It specifically declined to do so, and just amended the DTA to "clarify"  
 14                    that the relationship in which these defendants have admittedly engaged are prohibited.

15                    1. The Deed of Trust Act requires that the foreclosing entity and its agent,  
 16                    the trustee, conform exactly to the requirements of the statute in conducting a non-  
 17                    judicial foreclosure sale.

18                    When the Washington Legislature enacted the DTA permitting non-judicial  
 19                    foreclosures rather than requiring lenders to file a lawsuit in order to obtain title to a residential  
 20                    property following default by a homeowner, they carefully crafted a process which contained  
 21                    "safeguards" for the homeowner and explicit requirements for conducting a foreclosure sale.  
 22                    RCW 61.24, *et seq.* Nowhere in the DTA is there language excusing the foreclosing trustee  
 23                    from complying with its requirements if the trustee responsibilities are inconvenient. RCW  
 24                    61.24, *et seq.* As noted by the Court in Queen City Sav. & Loan Ass'n v. Mannhalt, 111  
 25                    Wn.2d 503, 760 P.2d 350 (1988), citing to 1 V. Towne, *Wash. Prac.* § 605 (2d ed. 1976),  
 26                    "[F]oreclosure proceedings must conform exactly to the statute." Id. at 514. "Because the

1 deed of trust foreclosure process is conducted without review or confirmation by a court, the  
 2 fiduciary duty imposed upon a trustee is exceedingly high.” Cox v. Helenius, 103 Wn.2d 383,  
 3 693 P.2d 683 (1985). As noted by the dissent in Queen City,

4 Relatively unsophisticated borrowers used to be able to rely on the judiciary to prevent  
 5 overreaching by lenders who make it their business to obtain every advantage from the  
 6 foreclosure process. *See*, RCW 61.12. Since the judiciary is not involved in deed of  
 7 trust foreclosures under the Act, only the words of the Act itself stand between the  
 8 borrower and the lender eager to foreclose. Unless we strictly construe the Act, that  
 protection will erode away to zero.

9 Queen City, *supra*, at 515.

10 The Washington DTA has three objectives: (1) that the nonjudicial foreclosure process  
 11 remains efficient and inexpensive; (2) that the process provides an adequate opportunity for  
 12 interested parties to prevent wrongful foreclosure; and (3) that the process promotes the  
 13 stability of land titles. Cox v. Helenius, *supra*, at 387. “Because the deed of trust foreclosure  
 14 process is conducted without review or confirmation by a court, the fiduciary duty imposed on  
 15 the trustee is exceedingly high.” *Id.* at 388-89. In Cox, the Washington Supreme Court noted  
 16 that even if the plaintiffs had not properly acted to restrain the sale, it would have nevertheless  
 17 been voided because of the trustee’s action. *Id.* The Cox Court noted:

18 Washington courts do not require a trustee to make sure that a grantor is protecting his  
 19 or her own interest. However, **a trustee of a deed of trust is a fiduciary for both the  
 20 mortgagee and mortgagor and must act impartially between them.** G. Osborne, G.  
 21 Nelson & D. Whitman, *Real Estate Finance Law* § 7.21 (1979).

22 **The trustee is bound by his office to present the sale under every possible  
 23 advantage to the debtor as well as to the creditor. He is bound to use not  
 24 only good faith but also every requisite degree of diligence in conducting the  
 25 sale and to attend equally to the interest of the debtor and creditor alike.**

26 Swindell v. Overton, 310 N.C. 707, 712, 314 S.E.2d 512 (1984) (emphasis added). *See*,  
Blodgett v. Martsch, 590 P.2d 298, 302 (Utah 1978) (“duty of trustee under a trust deed  
 is . . . to treat the trustor fairly and in according with a high punctilio of honor”);  
McHugh v. Church, 583 P.2d 210, 213 (Alaska 1978); Spires v. Edgar, 513 S.W.2d 372  
 (Mo. 1974); Whitlow v. Mountain Trust Bank, 215 Va. 149, 207 S.E.2d 837 (1974);

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1           Woodworth v. Redwood Empire Sav. & Loan Ass'n, 22 Cal.App.3d 347, 99 Cal.Rptr.  
 2           373 (1971).

3           Cox at 389 (emphasis added). The same standard should be applied here. Defendant First  
 4 American may have been properly appointed as the foreclosing trustee, but it did not act as the  
 5 trustee in conformity with the statute. Instead, Defendant First American was completely  
 6 uninvolved in the foreclosure process except for providing a trustee's sale guarantee and the  
 7 only entity involved in conducting the foreclosure was Defendant ForeclosureLink, in  
 8 contravention of the requirements of the DTA. In the case of Udall v. T.D. Escrow Services,  
 9 Inc., 130 P.3d 908, 911 (Wash. Ct. App. 2006), rev'd on other grounds, 154 P.3d 882 (Wash.  
 10 2007), the Court of Appeals reiterated the obligations of a trustee in a foreclosure and reminded  
 11 us of the requirements of the DTA, which include "an opportunity for interested parties to  
 12 prevent wrongful foreclosure." Id. at 911. Here, "interested parties", such as Mr. Buse, was  
 13 required to take action to stop the foreclosure in order to prevent a foreclosure from being  
 14 conducted by an unlicensed out of state entity, Defendant ForeclosureLink.  
 15

16           RCW 61.24.030(4) provides in part that a nonjudicial foreclosure cannot be held unless  
 17 all of its requirements have been met. Courts universally hold nonjudicial foreclosures of  
 18 deeds of trust by unauthorized persons void. 27 Cal. Jur. 3d Deeds of Trust § 260 (1987). Hall  
 19 v. Crowley, 12 Cal. App. 30, 33, 106 P. 426 (1909) states the obvious:  
 20

21           Numerous authorities are cited and discussed by appellants' counsel to the point  
 22 that "a sale under a deed of trust by a person not authorized to act is void" – a  
 23 proposition so elementary that it should be known to every student before he is  
 admitted to practice.

24 Id.

25           Also informative to the present case is the analytical approach of Washington courts to  
 26 potential substantive defects in non-judicial foreclosure sales. Namely, statutes allowing

1 foreclosure by power of sale granted in the deed of trust require strict construction against the  
 2 lender. 3A N. Singer, *Statutory Construction* § 69.04 (4<sup>th</sup> ed. 1986). Patton v. First Fed. Sav.  
 3 & Loan Ass'n, 118 Ariz. 473, 477, 578 P.2d 152 (1978) best states the reasons for this rule:

4 A mortgage generally may be foreclosed only by filing a civil action  
 5 while, under a Deed of Trust, the trustee holds a power of sale permitting  
 6 him to sell the property out of Court with no necessity of judicial action.  
 7 The Deed of Trust statutes thus strip borrowers of many of the  
 8 protections available under a mortgage. Therefore, lenders must strictly  
 comply with the Deed of Trust statutes, and the statutes and Deeds of  
 Trust must be strictly construed in favor of the borrower.

9 Id.

10 Defendant First American, as the foreclosing trustee, had a statutorily defined duty to  
 11 Mr. Buse under the DTA. The specific nature of the duty had been defined by the Washington  
 12 Supreme Court's decision in Cox, supra, at 388. The DTA was amended in 2008 to require that  
 13 the trustee act "impartially" as between the borrower, grantor and beneficiary, and it is again  
 14 being amended this year to require that the trustee "has a duty of good faith" to the parties.  
 15 RCW 61.24.010(4). In most states, "a trustee is treated as a fiduciary for both the borrower and  
 16 the lender." 13 *Baxter & Dunaway, The Law of Distressed Real Estate* (Clark Boardman  
 17 Company, Ltd., November 1990). In McPherson v. Purdue, 21 Wn. App. 450, 452-3, 585 P.2d  
 18 830 (1978), the court approved the following statement describing the duties of a trustee from  
 19 California law:  
 20

21 Among those duties is that of bringing "the property to the hammer under every  
 22 possible advantage to his cestui que trusts," using all reasonable diligence to obtain the  
 23 best price.

24 Id. at 452-3. Similarly, the Court in Cox, supra, adopted the following view:

25 Because the deed of trust foreclosure process is conducted without review or  
 26 confrontation by a court, the fiduciary duty imposed upon the trustee is "exceedingly  
 high".

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1      *Id.* The Cox Court also found that the four primary duties of the trustee were that he is bound  
 2 by his office to use diligence in presenting the sale under every possible advantage to the debtor  
 3 and creditor; trustee make take reasonable and appropriate steps top avoid sacrifice of the  
 4 debtor's property and interest; once a course of conduct is undertaken that is reasonably  
 5 calculated to instill a sense of reliance thereon by the grantor, that course of conduct cannot be  
 6 abandoned without notice to the grantor; and when an actual conflict of interest arises between  
 7 the roles of attorney for the beneficiary and trustee, the attorney should withdraw from one  
 8 position in order to prevent a breach of fiduciary duty. *Id.* Here, Defendants ForeclosureLink  
 9 and First American appear to have taken very intentional steps to create the false appearance of  
 10 complying with the statute (DTA) and have even gone so far as to falsely assert to this Court  
 11 that their actions are in conformity with the statute, while not reporting on its actual  
 12 requirements in its briefing.  
 13

14      C.    Even if the Court is uncertain yet whether the actions of Defendants  
ForeclosureLink and First American violate the requirements of the DTA, there are genuine  
issues of material fact as to nature and contents of the agreement between Defendants  
ForeclosureLink and First American.

15      As noted above, Mr. Buse maintains that these defendants did not meet their burden of  
 16 proof sufficient to obtain a summary judgment order from this Court as there remain genuine  
 17 issues of material fact. Neither of these defendants have provided this Court with the  
 18 documentary evidence to support a myriad of the assertions they make through the testimony of  
 19 their employees, and there are numerous contradictions in the testimony, as discussed in the  
 20 Facts section above. Specifically, the "agency" agreements which govern the relationship  
 21 between Defendants ForeclosureLink and First American have not been provided to the Court.  
 22 ER 1002. Mr. Buse can prove his claims for intentional infliction of emotional distress by  
 23 demonstrating to the Court that the wrongful and illegal initiation of a foreclosure sale by these  
 24 PLAINTIFF'S RESPONSE TO DEF.  
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 MOTION FOR SUMMARY JUDGMENT  
 CASE NO. 08-0510-MJP - 14

Law Offices of Melissa A. Huelsman, P.S.

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1 defendants caused him emotional distress because their actions go beyond the bounds of  
 2 decency.

3       Under the standard articulated by the Washington Supreme Court in Kloepfel v. Bokor,  
 4 149 Wn.2d 192, 196, 66 P.3d 630 (2003), symptoms resulting from a significant stress matter  
 5 meet the standard for intentional infliction of emotional distress or outrage. The potential loss  
 6 of one's home to foreclosure can certainly engender this sort of response. The tort of outrage is  
 7 committed when a defendant engages in conduct that is "so outrageous in character, and so  
 8 extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as  
 9 atrocious, and utterly intolerable in a civilized community" will constitute intentional infliction  
 10 of emotional distress. Id. (quoting Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291  
 11 (1975)), (quoting *Restatement (Second) of Torts* §46 cmt. d); *see also*, Reid v. Pierce County,  
 12 136 Wn.2d 195, 202, 961 P.2d 333 (1998); Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d  
 13 1002 (1989); Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987). Emotional distress  
 14 symptomatology is defined in the *Restatement of Torts* as including "all highly unpleasant  
 15 mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger,  
 16 chagrin, disappointment, worry and nausea."

17       Mr. Buse can prove his claim of "slander of title" against these defendants because they  
 18 made false statements about the nature of their relationship to the title to his property.  
 19 Specifically, Defendant First American was appointed the trustee and then allowed Defendant  
 20 ForeclosureLink to act as the trustee under the false assertion that it was an "agent" of  
 21 Defendant First American, when in fact it was not an "agent" either under the definition in the  
 22 DTA or under a generic definition of an "agent". Defendant ForeclosureLink initiated the  
 23 foreclosure process after receiving contact from Mr. Block's representative, and it was the  
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entity that contacted Defendant First American – not the other way around. *See,* ForeclosureLink Aff., ¶6-14; Jeffers Aff., ¶6-19. Slander of title is defined as (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's title; and (5) result in plaintiff's pecuniary loss. Rorvig v. Douglas, 123 Wn.2d 854, 869, 873 P.2d 492 (1994), *citing Pay 'N Save Corp. v. Eads*, 53 Wn. App. 443, 448, 767 P.2d 592 (1989), *citing Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375, 617 P.2d 704 (1980).

Mr. Buse's cause of action for breach of fiduciary is among his primary claims and is the clearest of all claims, based upon the facts and law as described above. Defendants First American and ForeclosureLink, as its purported agent, acting as the trustee under a Deed of Trust signed by Mr. Buse, breached their duties to him by way of the non-compliance with the requirements of the DTA. In essence, the defendants assert that because Mr. Buse was in default at various times in this process, he cannot be harmed by their intentional breach of their duties to him and the requirement that they adhere to the terms of the DTA. This argument is nonsensical. These defendants' duties to Mr. Buse only mattered once he defaulted and a foreclosure sale was being initiated. The trustee only acts to enforce the terms of the Deed of Trust **after** a default has occurred. It makes no sense at all to assert that a trustee may breach its duty to act in conformity with the DTA if the borrower has defaulted because it does not act until the default occurs, yet this is essentially the argument being made by the Defendants. And flowing from this breach of fiduciary duty is Mr. Buse's claim for violations of the Consumer Protection Act, RCW 19.86, *et seq.* The actions of Defendants ForeclosureLink and First American were not limited to Mr. Buse's foreclosure sale. As evidenced by the Affidavits filed in support of their Summary Judgment Motions, these defendants have been continuously and

1 repeatedly acting in contravention of the requirements of the Deed of Trust Act. These acts do  
 2 constitute an unfair and deceptive act or practice such that it caused damage to Mr. Buse's  
 3 property by falsely asserting Defendant ForeclosureLink had the legal authority to conduct the  
 4 foreclosure sale.

5       The Consumer Protection Act ("CPA") declares unlawful "unfair or deceptive acts in  
 6 the conduct of any trade or commerce." RCW 19.86.020. The CPA defines "trade or  
 7 commerce" broadly, to include "sale of assets or services, and any commerce directly or  
 8 indirectly affecting the people of the state of Washington." RCW 19.86.010(2). The CPA  
 9 expressly confirms its provisions "shall be liberally construed" to fulfill its objective of  
 10 protecting the public against "unfair, deceptive, and fraudulent acts or practices." RCW  
 11 19.86.920. The CPA is subject to enforcement by the Attorney General, by other state  
 12 governmental entities, and by private individuals. RCW 19.86.080, 090.

13       To establish a private CPA claim, the plaintiff must generally establish the following  
 14 five elements: (i) that the defendant committed an unfair or deceptive act or practice; (ii) that  
 15 the act or practice occurred in the scope of trade or commerce; (iii) that the act or practice  
 16 affects the public interest; (iv) that the plaintiff suffered injury; and (v) that the injury was  
 17 caused by the act or practice. *See, Cashmere Valley Bank v. Brender*, 116 P.3d 421 (2005); *see also, Jeckle v. Crotty*, 120 Wn. App. 374; 85 P.3d 931 (2004); *Micro Enhancement Intern, Inc. v. Coopers & Lynbrand, LLP*, 110 Wn. App. 412; 40 P.3d 1206 (2002). Whether a given  
 18 practice is "unfair or deceptive" is a normally a question for the finder of fact. *Burbo v. Harley*  
 19 *C. Douglass, Inc.*, 125 Wn. App. 684; 106 P.3d 258 (2005); *see also, Guijosa v. Wal-Mart*  
 20 *Stores, Inc.*, 144 Wash.2d 907; 32 P.3d 250 (2001). Here, Mr. Buse maintains that these  
 21 defendants were engaged in numerous unfair and deceptive acts in order to increase their  
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 23

1 profits, speed along the foreclosure sale and benefit each other rather than acting in conformity  
 2 with the DTA.

3       The next element in a CPA claim is showing that the act occurred in the course of trade  
 4 or commerce. This element generally requires some sort of commercial relationship between  
 5 the defendant and the homeowner. *See, Merchant v. Peterson*, 38 Wn. App. 855, 860; 690 P.2d  
 6 1192 (1984); *see also, Holiday Resort Community Association v. Echo Lake Associates, LLC*,  
 7 135 P.3d 499, 504 (2006). However, there does not need to be privity of contract or a specific  
 8 contractual relationship between the parties. *Holiday Resort* at 504. Here, it is clear that these  
 9 Defendants engaged in the challenged wrongful acts in the course of “trade or commerce” – the  
 10 servicing of a mortgage loan and the completion of a foreclosure sale under the terms of the  
 11 Note and Deed of Trust. RCW 19.86.010(2).

12       The next element in a private CPA claim is showing that the unfair or deceptive act  
 13 “impacts the public interest.” Whether the practice impacts the public interest is also a question  
 14 of fact, but is generally determined according to such factors as (i) whether the acts were  
 15 committed in the course of the defendant’s business; (ii) whether the defendant advertised to  
 16 the general public; (iii) whether the defendant actively solicited the plaintiff or others; and (iv)  
 17 whether the defendant occupied a superior bargaining position to the plaintiff. *Cotton v.*  
 18 *Kronenberg*, 111 Wn. App. 258, 274; 44 P.3d 878 (2002). These, and potentially other relevant  
 19 factors, are to be viewed in light of the context and circumstances in which the alleged unfair or  
 20 deceptive practices took place. *Cotton* at 274. In this case, it is clear that the regular unfair and  
 21 deceptive actions evidenced herein by these Defendants would have an impact upon the public  
 22 interest since they regularly engage in the improper and illegal foreclosures against Washington  
 23 state residential properties. Their actions are part of a regular course of business practices

1 which will result in wrongful foreclosures and improper loan servicing of other individuals in  
2 this state. To be blunt – they must be stopped.

3 Another more recent case of importance in determining liability under the CPA is the  
4 Washington Supreme Court's decision in Indoor Billboard v. Integra Telecom, 162 Wn.2d 59;  
5 170 P.3d 10 (2007), where the Court held that the "proximate cause" standard should be  
6 applied to CPA claims. The Court found:

7 We conclude where a defendant has engaged in an unfair or deceptive act or  
8 practice, and there has been an affirmative misrepresentation of fact, our case  
9 law establishes that there must be some demonstration of a causal link between  
10 the misrepresentation and the plaintiff's injury. Indoor Billboard urges us to  
11 adopt a per se rule and hold that payment of Integra's invoice is per se sufficient  
12 to establish the proximate cause of plaintiff's damages. We reject Indoor  
13 Billboard's per se rule because mere payment of an invoice may not establish a  
14 causal connection between the unfair or deceptive act or practice and plaintiff's  
15 damages. Proximate cause is a factual question to be decided by the trier of fact.  
Payment of an invoice may or may not be sufficient to establish a causal  
connection between the misrepresentation of fact and damages, but payment of  
the invoice may be considered with all other relevant evidence on the issue of  
proximate cause.

16 We hold that the proximate cause standard embodied in WPI 15.01 is required to  
17 establish the causation element in a CPA claim. A plaintiff must establish that,  
18 but for the defendant's unfair or deceptive practice, the plaintiff would not have  
suffered an injury.

19 Id. at 84.

## 20 CONCLUSION

21 Based upon the foregoing, Mr. Buse maintains that Defendants ForeclosureLink and  
22 First American have not met their burden required to obtain a summary judgment order because  
23 the Washington DTA clearly requires conformity with all of its requirements and these  
24 defendants have not complied with the statute. Moreover, there are other genuine issues of  
25 material fact which are in dispute and which must be reserved for determination by the trier of  
26 fact.

PLAINTIFF'S RESPONSE TO DEF.  
FORECLOSURELINK AND FIRST AMERICAN'S  
MOTION FOR SUMMARY JUDGMENT  
CASE NO. 08-0510-MJP - 19

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1 DATED this 20<sup>th</sup> day of April, 2009.  
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5 LAW OFFICES OF MELISSA A. HUELSMAN, P.S.  
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/s/ Melissa A. Huelsman  
Melissa A. Huelsman, WSBA No. 30935  
Attorney for Plaintiff Richard O. Buse

Richard O. Buse hereby affirms under penalty of perjury:

That I am the plaintiff in the above-entitled lawsuit to whom these interrogatories are addressed, and as such am authorized to make this verification; that I have read the foregoing answers to interrogatories and requests for production of documents, know the contents thereof, and believe the same to be true.

DATED this day of March \_\_\_\_\_, 2009

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Richard O. Buse

PLAINTIFF'S RESPONSE TO DEF.  
FORECLOSURELINK AND FIRST AMERICAN'S  
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CASE NO. 08-0510-MJP - 20

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## **DECLARATION OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing was served on the 12<sup>th</sup> day of March, 2009, on the party of record as stated below in the manner indicated:

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Foreclosurelink, Inc.*

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED at Seattle, Washington on March 12<sup>th</sup>, 2009.

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Monique Lefebvre

**PLAINTIFF'S RESPONSE TO DEF.  
FORECLOSURELINK AND FIRST AMERICAN'S  
MOTION FOR SUMMARY JUDGMENT  
CASE NO. 08-0510-MJP - 21**